Filed 2/27/19 Applied General Agency, Inc. v. Chinese Community Health Plan CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

APPLIED GENERAL AGENCY, INC., et al., Plaintiffs/Cross-Defendants and Appellants, v. CHINESE COMMUNITY HEALTH PLAN, Defendant/Cross-Complainant and Respondent.	G055669 (Super. Ct. No. 30-2015-00766717) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Deborah C. Servino, Judge. Affirmed.

Call & Jensen, David R. Sugden and Scott R. Hatch for Plaintiffs/Cross-Defendants and Appellants.

Hooper, Lundy & Bookman, Eric D. Chan and Jonathan H. Shin for Defendant/Cross-Complainant and Respondent.

* * *

This contract dispute between Applied General Agency, Inc. (AGA) and Chinese Community Health Plan (CCHP) implicates two agreements: a 2002 contract and a 2013 contract. In its complaint, AGA alleged CCHP breached the parties' 2002 contract. In its cross-complaint against AGA and AGA's broker, Michael Werner, CCHP alleged AGA and Werner breached the 2013 contract. The 2013 contract allows for the recovery of attorney fees in certain circumstances; the 2002 contract does not.

A jury found in favor of AGA on its complaint against CCHP for breach of the 2002 contract and awarded AGA $265,168. The jury found in favor of CCHP on its cross-complaint against AGA for breach of the 2013 contract, but awarded CCHP no damages.

AGA and Werner filed a postjudgment motion for attorney fees based on the fee provisions in the 2013 contract. The trial court denied their motion because it concluded the 2002 contract on which AGA sued does not include a fee-shifting provision, AGA was not the prevailing party on CCHP's cross-complaint for breach of the 2013 contract, and the indemnification provisions in the 2013 contract only apply to third party claims.

We find the indemnification provisions in the 2013 contract apply not only to third party claims, but also to certain direct claims between the parties, but conclude those indemnification provisions do not apply to the particular claims litigated below. We further conclude the fee-shifting provision in the 2013 contract's arbitration clause is inapplicable. We therefore affirm the order denying the motion for attorney fees.

I.

FACTS

AGA is an insurance agency. It contracts with insurance carriers to market and sell their insurance products to individuals and groups.

In 2002, AGA and CCHP, an insurance carrier, entered into a written agreement that required AGA to market CCHP's insurance policies. In return, CCHP

agreed to pay AGA commissions based on the premiums CCHP received from groups AGA brought to CCHP. The contract required CCHP to pay AGA commissions "for as long as [each] group remains enrolled with [CCHP]." Although CCHP initially paid AGA under the 2002 contract, CCHP eventually stopped making payments.

In 2013, CCHP sent AGA's broker, Michael Werner, a new form contract and asked him to sign and return it. Werner did so. The 2013 contract did not reference AGA, nor did it specify whether Werner was executing the contract individually or on behalf of AGA.

The 2013 contract placed certain prerequisites on CCHP's obligation to pay commissions. For example, customers purchasing insurance had to formally designate the broker receiving commissions as their "Broker of Record." The contract also stated "[t]his Agreement supersedes all previous agreements and understandings concerning the relationship between CCHP and Broker." Relying on these provisions, and noting several large group accounts had not designated either AGA or Werner as their broker of record, CCHP decreased and ultimately terminated its commission payments to AGA.

AGA sued CCHP, asserting a single cause of action for breach of contract based on CCHP's failure to pay AGA its commissions under the parties' 2002 contract. CCHP filed a cross-complaint against AGA and Werner based on the 2013 contract, asserting causes of action for breach of contract and quasi-contract. CCHP alleged AGA and Werner breached the 2013 contract by accepting commission payments from CCHP when they had not been appointed the broker of record.

At trial, AGA asked the jury to award damages of about $1.3 million on its complaint, and CCHP asked for damages of about $200,000 on its cross-complaint.

The jury found in favor of AGA on its complaint for breach of the 2002 contract, and it awarded AGA $265,168 in damages. As for CCHP's cross-complaint based on the 2013 contract, the jury's findings were somewhat inconsistent: on CCHP's claim for quasi-contract and restitution, the jury found in favor of AGA and Werner and

against CCHP; on CCHP's claim for breach of contract against Werner, the jury found in favor of Werner and against CCHP; but on CCHP's claim for breach of contract against AGA, the jury found "in favor of [CCHP] and against [AGA]," yet awarded CCHP no damages.[1] Ultimately, the jury awarded AGA $265,168 for CCHP's breach of the 2002 contract, while awarding CCHP nothing for AGA's breach of the 2013 contract.

AGA and Werner incurred attorney fees in prosecuting AGA's complaint on the 2002 contract and in defending against CCHP's cross-complaint on the 2013 contract. Relying on certain indemnification and arbitration provisions in the 2013 contract, which we discuss below, they filed a postjudgment motion for attorney fees, seeking about $1.38 million from CCHP.

The trial court denied their motion, explaining the indemnification provisions in question applied to third party claims, not actions between the contracting parties. The court also concluded AGA was not the prevailing party on CCHP's cross-complaint because, even though the jury awarded no damages to CCHP, the jury found in CCHP's favor on its breach of contract claim. AGA and Werner appeal that order.

II.

DISCUSSION

A. *Governing Principles*

"Under the American rule, each party to a lawsuit ordinarily pays its own attorney fees." (*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 751 (*Mountain Air*).) Code of Civil Procedure section 1021 codifies this general rule but allows parties to contract out of it. (*Ibid*.)

Parties to a contract have a variety of options in deciding whether and how to allocate attorney fees. For example, they "may agree the prevailing party will be awarded all the attorney fees incurred in any litigation between them, limit the recovery

[1] From this, the parties infer the jury determined *both* contracts to be valid.

of fees only to claims arising from certain transactions or events, or award them only on certain types of claims." (*Brown Bark III, L.P. v. Haver* (2013) 219 Cal.App.4th 809, 818 (*Brown Bark III*).) We review de novo whether a legal basis exists for an award of attorney fees where, as here, extrinsic evidence has not been offered to interpret the contract and the facts are not in dispute. (*Id*. at p. 821; *Paul v. Schoellkopf* (2005) 128 Cal.App.4th 147, 151 (*Paul*).)

Here, the parties did not include an attorney fee provision in their 2002 contract, but their 2013 contract contains several provisions referencing the recovery of attorney fees — namely, the provisions on indemnity and the provision on arbitration.

"Indemnity agreements are construed under the same rules which govern the interpretation of other contracts." (*Continental Heller Corp. v. Amtech Mechanical Services, Inc*. (1997) 53 Cal.App.4th 500, 504 (*Continental Heller*).) Thus, they "must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636; all further statutory citations are to this code, unless noted otherwise.) If possible, we ascertain intent "from the writing alone." (Civ. Code, § 1639.) "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." (Civ. Code, § 1638.) "The words of a contract are to be understood in their ordinary and popular sense . . . unless used by the parties in a technical sense, or unless a special meaning is given to them by usage . . . ." (Civ. Code, § 1644.)

B. *The 2013 Contract's Indemnity Provisions Are Not Limited to Third-Party Claims*

We begin with the threshold question of whether the 2013 contract's indemnity provisions apply to disputes between the contracting parties or only to third-party claims. These provisions state as follows:

"7.2 Broker Indemnity. Broker[2] shall indemnify and hold harmless CCHP from and against all claims, liability, loss, cost[,] damage, injury or penalties thereof, including reasonable attorney fees and other costs of litigation resulting directly or indirectly from: any breach or failure by Broker to comply with the terms and conditions of this Agreement or applicable state and federal laws; any dispute between Broker and its employees or between Broker and Members or Applicants arising out of or relating to Broker's acts, errors or omissions; any unauthorized use of sales material; any unlawful sales practices; or any act or incident of fraud, malpractice, wrongful acts, negligence, misrepresentation, defamation, or intentional misconduct, caused or alleged to have been caused by Broker.

"7.3 CCHP Indemnity. CCHP shall indemnify and hold harmless Broker from and against all claims, liability, loss, cost[,] damage, injury or penalties thereof, including reasonable attorney fees and other costs of litigation resulting directly or indirectly from CCHP's breach or failure to comply with the terms of this Agreement or the Knox-Keene Health Care Service Plan Act of 1975 and the rules and regulations related to it; or any act or incident of fraud, malpractice, wrongful acts, negligence, misrepresentation, defamation, intentional misconduct, or errors or omissions, caused or alleged to have been caused by CCHP." (Bold and underscoring omitted.)

"Although indemnity generally relates to third party claims, 'this general rule does not apply if the parties to a contract use the term "indemnity" to include direct liability as well as third party liability.'" (*Zalkind v. Ceradyne, Inc.* (2011) 194Cal.App.4th 1010, 1024 (*Zalkind*).) In other words, if the contractual language is broad enough, an indemnity provision may encompass not only claims brought by third parties, but also direct claims between the parties. (*Rideau v. Stewart Title of California, Inc.* (2015) 235 Cal.App.4th 1286, 1294 (*Rideau*) ["[a] contractual indemnity provision

[2] On appeal, the parties assume the term "Broker" as used in the 2013 contract refers to AGA. We make the same assumption.

may be drafted either to cover claims between the contracting parties themselves, or to cover claims asserted by third parties"].)

Section 2772 confirms this result: it defines "indemnity" as "a contract by which one engages to save another from a legal consequence of the conduct of *one of the parties*, or of some other person." (Italics added.) This statutory language plainly contemplates "[i]ndemnity may apply to either direct or third party claims." (*Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 556, fn. 5 (*Dream Theater*).)

In determining the scope of a particular indemnity provision, "[i]t is the intent of the provision, and the agreement as a whole, that governs." (*Hot Rods, LLC v. Northrop Grumman Systems Corp*. (2015) 242 Cal.App.4th 1166, 1179.) "'When the parties knowingly bargain for the protection at issue, the protection should be afforded. … [E]ach case will turn on its own facts.'" (*Zalkind, supra,* 194 Cal.App.4th at pp. 1024-1025.)

Whether a particular indemnity provision extends to direct claims between the parties depends on the contract language. That said, several courts have held that a provision requiring one party to indemnify the other for losses resulting from the party's contract breach covers direct claims between the parties, particularly where the clause does not expressly limit its application to third-party claims. (See, e.g., *Dream Theater, supra,* 124 Cal.App.4th at pp. 554-555 [parties' agreement to "'indemnify'" one another for breaches of contractual representations, warranties, or covenants encompassed direct claims]; *Continental Heller, supra*, 53 Cal.App.4th at pp. 508-509 [subcontractor's agreement to "indemnify" contractor for losses incurred "*on account of any breach of* [subcontractor's] *obligations and covenants*" entitled contractor to recover fees in breach of contract action with subcontractor]; see also *Baldwin Builders v. Coast Plastering Corp.* (2005) 125 Cal.App.4th 1339, 1342, 1344-1345 (*Baldwin Builders*) [provision requiring subcontractors to "pay all costs, including attorney's fees, *incurred in enforcing*

this indemnity agreement" was not limited to third party claims but rather "unambiguously contemplate[d] an action *between the parties*"].)

In *Zalkind*, for example, the contract required the buyer to indemnify the sellers from damages arising from "'[a]ny breach or default by the Buyer of its covenants or agreements contained in this Agreement,'" and the contract broadly defined "'Damages'" to include, among other things, losses, costs, and attorney fees incurred by the indemnified party. (*Zalkind, supra,* 194 Cal.App.4th at pp. 1022-1023.) We determined the provision was "broadly worded" and did "not limit indemnification to third party claims"; it instead extended indemnification to all damages sellers incurred from the buyer's breach of contract. (*Id.* at p. 1027.) In that context, we found the word "'indemnify'" meant "'make good,' 'reimburse,' or 'compensate.'" (*Ibid*.) We also reasoned other parts of the contract, when read together, supported a broad interpretation of the indemnification provision. (*Id.* at pp. 1027-1029.) Thus, we concluded the indemnity provision in question "encompass[ed] direct claims for breach of contract." (*Id.* at p. 1029.)[3]

Applying a similar analysis here, we conclude Sections 7.2 and 7.3 are not limited to third party disputes. The provisions are broadly worded. Among other things, they require the parties to "indemnify" (i.e., reimburse) one another for any losses and attorney fees incurred from the other's "breach or failure to comply with the terms of this Agreement." This language unequivocally provides that if one party breaches the

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[3] More narrowly drafted indemnity clauses, by comparison, do not typically extend to direct claims between the parties. (See, e.g., *Carr Business Enterprises, Inc. v. City of Chowchilla* (2008) 166 Cal.App.4th 14, 23 [indemnity provision that contained "no express language authorizing recovery of fees in an action to enforce the contract" only applied to third party claims]; *Myers Building Industries, Ltd. v. Interface Technology, Inc*. (1993) 13 Cal.App.4th 949, 974-975 [indemnity provision covering all claims arising out of "'the performance of the contract'" constituted a third party claims indemnity clause].)

agreement and causes the other party to incur attorney fees, the nonbreaching party is entitled to recover those fees.

C. *The 2013 Contract's Indemnity Provisions Do Not Entitle AGA or Werner to Recover Their Attorney Fees from CCHP*

Having determined the 2013 contract's indemnity provisions are not limited to third party claims, we now consider whether they obligate CCHP to pay the attorney fees AGA incurred in prosecuting its complaint on the 2002 contract and the fees AGA and Werner incurred in defending against CCHP's cross-complaint on the 2013 contract. For the reasons set forth below, we conclude they do not.

It bears repeating our analysis is highly dependent on the language of the 2013 contract. (*Continental Heller, supra,* 53 Cal.App.4th at p. 504.) A "contract containing indemnification language or attorney fees provisions must be analyzed on its own terms" (*Rideau, supra,* 235 Cal.App.4th at p. 1297), and "the extent of the duty to indemnify must be determined from the contract itself." (*Zalkind, supra,* 194 Cal.App.4th at p. 1024.)

1. *Section 7.3*

We begin with Section 7.3, which addresses the scope of CCHP's indemnity obligations to AGA. As is evident from the language quoted above, Section 7.3 has two distinct parts. The language *before* the semicolon covers the scope of CCHP's indemnity obligations if CCHP breaches the 2013 contract or violates certain laws regulating health care service plans. The language *after* the semicolon covers the scope of CCHP's indemnity obligations for certain torts committed by CCHP.

a. *The First Part of Section 7.3*

The first part of Section 7.3, which requires CCHP to indemnify AGA for losses resulting "from *CCHP's* breach or failure to comply with the terms of *this* Agreement" (italics added), is not applicable here. AGA and Werner never accused CCHP of breaching the 2013 contract, and the jury never made that finding. AGA only

accused CCHP of breaching the *2002* contract, which is not mentioned anywhere in Section 7.3. The first part of Section 7.3 therefore does not apply.

AGA nevertheless argues CCHP's breach of the 2002 contract triggers CCHP's indemnity obligations under Section 7.3 of the 2013 contract. In support, AGA contends the 2002 contract and the 2013 contract must be read together per Civil Code section 1642, which states: "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." AGA contends if the contracts are read together the fee provision in the 2013 contract applies to the entire case.

Civil Code section 1642 is often invoked "[i]n determining whether a contract contains an applicable attorney fees provision." (*Mountain Air*, *supra*, 3 Cal.5th at p. 759.) Although Civil Code section 1642 "'is most frequently applied to writings executed contemporaneously, . . . it is likewise applicable to agreements executed by the parties at different times if the later document is in fact a part of the same transaction.'" (*Versaci v. Superior Court* (2005) 127 Cal.App.4th 805, 814; see *Mountain Air*, *supra*, at p. 759 [documents concerning the same subject and made as part of the same transaction may be construed together even if not executed contemporaneously and even if they do not refer to each other].)

We are not persuaded Civil Code section 1642 requires us to read the 2002 and 2013 contracts together. "'Whether a document is incorporated into the contract depends on the parties' intent as it existed at the time of contracting.' [Citation.] '"'"For the terms of another document to be incorporated into the document executed by the parties *the reference must be clear and unequivocal* ...."'"' [Citation.] 'The contract need not recite that it "incorporates" another document, so long as it "guide[s] the reader to the incorporated document."'" To be construed together, the separate instruments

must be 'so interrelated as to be considered one contract.' [Citation.]" (*R.W.L. Enterprises v. Oldcastle, Inc.* (2017) 17 Cal.App.5th 1019, 1027-1028 (*Oldcastle*).[4])

Here, the two contracts were executed nearly 12 years apart, the 2013 contract makes no reference to the 2002 contract, the 13-page 2013 contract covers topics not addressed by the single-page 2002 contract, and the 2013 contract's integration clause provides the 2013 contract "supersedes all previous agreements and understandings concerning the relationship between CCHP and Broker." These facts collectively weigh against reading the two contracts together. (*Oldcastle, supra,* 17 Cal.App.5th at p. 1031 ["where the two writings were executed nine years apart, we believe an integration clause in the later writing weighs heavily against a finding that the parties intended to add terms to their prior agreement"].) CCHP's breach of the 2002 contract therefore does not trigger CCHP's indemnity obligations under the first part of Section 7.3 in the 2013 contract.

b. *The Second Part of Section 7.3*

The second part of Section 7.3 is equally inapplicable. The second part requires CCHP to indemnify AGA against claims and losses resulting from a variety of torts — namely, "any act or incident of fraud, malpractice, wrongful acts, negligence, misrepresentation, defamation, intentional misconduct, or errors or omissions, caused or alleged to have been caused by CCHP." AGA contends CCHP's breach of the 2002 contract amounted to a "wrongful act," "intentional misconduct," and an "error and omission," thereby bringing this case within the scope of the second part of Section 7.3. We disagree.

The parties sued one another solely for breach of contract and quasi-contract; they did not allege any tort claims. The jury never found CCHP had engaged in

[4] We deny AGA's and Werner's request for judicial notice of the briefs filed in the *Oldcastle* appeal. We fail to see how such matters are relevant here or in understanding the *Oldcastle* opinion, which speaks for itself.

any fraud, malpractice, wrongful act, negligence, misrepresentation, defamation, intentional misconduct, or errors or omissions against AGA. We may not make a new factual finding on appeal that CCHP's breach of the 2002 contract constituted a "wrongful act" or any of the other torts listed in the second part of Section 7.3.

The notion that CCHP's breach of the 2002 contract could constitute a "wrongful act" also conflicts with the indemnity clause as a whole. The first part of Section 7.3 already specifies when and whether CCHP must indemnify AGA for contract-based claims; those obligations are specifically limited to breaches of "*this* Agreement" (i.e., the 2013 contract). Section 7.3 does not mention any other contracts, and there is nothing to show the parties intended breaches of other contracts to fall within the indemnity obligation by way of the "wrongful act" language or other torts. In short, calling CCHP's breach of the 2002 contract a "wrongful act" or any of the other torts enumerated in Section 7.3 strikes us as trying to squeeze a square peg into a round hole.

2. *Section 7.2*

Having determined Section 7.3 is inapplicable to the claims at issue, we next consider the applicability of Section 7.2. On its face, Section 7.2 is unavailing to AGA because it governs the circumstances in which *AGA* must indemnify *CCHP*, not when CCHP must indemnify AGA. However, AGA argues Civil Code section 1717 (section 1717) renders this provision reciprocal and confers on AGA a right of indemnity from CCHP for fees incurred in this case.

Section 1717 provides in pertinent part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." (Civ. Code, § 1717, subd. (a).) The statute "makes an otherwise unilateral attorney fee provision reciprocal and entitles a

noncontracting party to recover contractual attorney fees when it defeats a contract-based cause of action that would have made the noncontracting party liable for contractual attorney fees had it lost." (*Brown Bark III, supra,* 219 Cal.App.4th at pp. 814-815.)

In *Santisas v. Goodin* (1998) 17 Cal.4th 599 (*Santisas*), our Supreme Court recounted the "[t]he primary purpose of section 1717 is to ensure mutuality of remedy for attorney fee claims under contractual attorney fee provisions." (*Id.* at p. 610.) The section safeguards mutuality of remedy in two circumstances. The first is when a contract expressly provides the right to collect attorney fees to one party, but not the other. (*Id.* at pp. 610-611.) The second "is when a person sued on a contract containing a provision for attorney fees to the prevailing party defends the litigation 'by successfully arguing the inapplicability, invalidity, unenforceability, or nonexistence of the same contract.'" (*Id.* at p. 611.) "This second situation arises not only when a signatory to a contract defeats another signatory's claims, but also when a *non*signatory defeats a signatory's efforts to enforce the contract." (*Brown Bark III, supra,* 219 Cal.App.4th at p. 819.)

Without section 1717, the prevailing party under either of these two circumstances would be unable to claim attorney fees as a contractual right. (*Santisas, supra,* at p. 611.) "[T]he right to attorney fees would be effectively unilateral . . . because only the party seeking to affirm and enforce the agreement could invoke its attorney fee provision." (*Ibid.*) To avoid such a unilateral right and to ensure mutuality of remedy, "it has been consistently held that when a party litigant prevails in an action on a contract by establishing that the contract is invalid, inapplicable, unenforceable, or nonexistent, section 1717 permits that party's recovery of attorney fees whenever the opposing parties would have been entitled to attorney fees under the contract had they prevailed." (*Ibid.*)

"[S]ection 1717 and its reciprocity principles, however, have 'limited application.'" (*Brown Bark III, supra,* 219 Cal.App.4th at p. 820.) "Before section 1717 comes into play, it is necessary to determine . . . the scope of the attorney fee agreement."

(*Maynard v. BTI Group, Inc.* (2013) 216 Cal.App.4th 984, 990.) As is evident from the statutory language, section 1717 *only* applies if "the contract *specifically* provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded *either to one of the parties or to the prevailing party*." (§ 1717, subd. (a), italics added; see *Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1342.) The 2013 contract does no such thing.

First, the 2013 contract does not say only *one* party may recover its fees or costs. To the contrary, Sections 7.2 and 7.3 are bilateral in nature, allowing CCHP to recover its fees in some circumstances and allowing AGA to recover its fees in other instances. Specifically, Section 7.2 obligates AGA to "indemnify . . . CCHP . . . [for] attorney fees . . . resulting directly or indirectly from: any breach or failure by [AGA] to comply with the terms and conditions of this Agreement," and Section 7.3 obligates CCHP to "indemnify . . . [AGA] . . . [for] . . . attorney fees . . . resulting directly or indirectly from CCHP's breach or failure to comply with the terms of this Agreement." As these clauses confirm, the 2013 contract does not contain a unilateral fee-shifting provision. It therefore does not "specifically provide[] that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded . . . *to one of the parties*" under section 1717.[5]

Nor does the 2013 contract specifically award attorney fees "to the prevailing party" under section 1717. Indeed, neither the phrase "prevailing party" nor its functional equivalent appear anywhere in the indemnity provisions. Instead, AGA's and CCHP's entitlement to recover attorney fees under Sections 7.2 and 7.3 turns on whether a breach actually occurred, not on which side prevails. These provisions give a

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[5] Section 7.2, standing alone, is unilateral. However, we must read Section 7.2 in unison with Section 7.3, which taken together are bilateral. (See § 1641 ["The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping interpret the other"].)

party who successfully establishes the other side breached the contract the right to seek indemnification for its fees, but they do *not* confer the same right on a party who successfully *defeats* a breach of contract claim. It would have been simple enough for the parties to provide: "If any action is commenced to enforce or interpret the terms of this agreement, the prevailing party shall be entitled to recover reasonable attorney fees." They did not do so.

Although "there is no magic formulation for a fees provision," and "no legislative form language [is] required by section 1717" (*International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1183-1184 (*International Billing*), we still must give effect to the words of section 1717, which *only* comes into play if "the contract *specifically* provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party." (Italics added.) The 2013 contract does neither. AGA therefore cannot use section 1717 to make Section 7.2 applicable here.[6]

Our holding might be different if the 2013 contract did not include Section 7.3 and only included Section 7.2. In that instance, the right to recover attorney fees would be truly unilateral and unfairly drafted in favor of CCHP, requiring section 1717 reciprocity to level the contractual playing field. Our holding might also be different if

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[6] We do not mean to suggest section 1717 is *never* applicable in the context of an indemnification provision that encompasses direct claims between the parties. (Cf. *Rideau, supra,* 235 Cal.App.4th at p. 1302 [section 1717 not triggered by a clause allowing recovery of attorney fees as an item of loss in a third party indemnity provision]; *Campbell v. Scripps Bank* (2000) 78 Cal.App.4th 1328, 1337 [same].) Several courts have applied the reciprocal principles of section 1717 to indemnity provisions covering direct claims between the parties. (See, e.g., *Baldwin Builders, supra,* 125 Cal.App.4th at p. 1341 [where contract allowed general contractor to recover fees incurred in enforcing contract's indemnity provisions against subcontractor, section 1717 rendered fee provision reciprocal]; *International Billing, supra,* 84 Cal.App.4th at p. 1182 [where employee contracted to reimburse employer for fees incurred from employee's misuse of confidential information, section 1717 rendered fee provision reciprocal].) However, unlike here, those cases involved unilateral fee provisions.

the 2013 contract allowed the prevailing party in a contract dispute to recover its fees, and if AGA had prevailed on the cross-complaint "by establishing that the contract [was] invalid, inapplicable, unenforceable, or nonexistent." (*Santisas, supra,* 17 Cal.4th at p. 611.)

However, in the precise circumstances presented — where the jury determined AGA breached the 2013 contract, but awarded CCHP no damages — neither section 1717 nor Section 7.2 compel us to award AGA its attorney fees. The parties expressly agreed to mutual indemnity provisions setting forth when and whether they could recover attorney fees from one another in the event a party breached the 2013 contract. This was not one of the situations covered.

Considering the parties expressly contracted about when they would indemnify one another for contract-based claims, we have no basis to apply section 1717 and thereby expand the scope of CCHP's indemnification obligation. *Brittalia Ventures v. Stuke Nursery Co., Inc.* (2007) 153 Cal.App.4th 17 is instructive on this point. In *Brittalia*, the plaintiff sued to enforce a 1998 contract that did not contain an attorney fee provision, but the defendant argued a different contract, which *did* contain an attorney fee provision, applied. (*Id.* at p. 29.) After prevailing at trial, the plaintiff sought to recover its attorney fees based on the fee provision in that second contract. According to the plaintiff, if the defendant had prevailed on its defense based on the other contract, defendant could have recovered its attorney fees under the fee provision in that contract. Thus, argued the plaintiff, section 1717 mandated that remedy be mutual and entitled the plaintiff to recover its fees. (*Id.* at p. 30.)

In rejecting this argument, the *Brittalia* court reasoned section 1717 fee awards are "'governed by equitable principles'" and it would be "unfair to award Brittalia its attorney fees under section 1717. Brittalia cannot be allowed to win on its contract action by championing one contract without an attorney fee provision, and then turn around and ask for attorney fees as prevailing party based on a different contract, with an

attorney fee provision, that Brittalia had to defeat to secure its victory. That would provide a new twist on the concept of contract shopping. . . . '[Section 1717] cannot be bootstrapped to provide for attorney fees for breach of a contract that has no attorney fees provision.' [Citation.] In short, Brittalia has gotten its contractual cake and will now have to eat its own attorney fees." (*Brittalia*, *supra*, at p. 31.) The same analysis applies here.

D. *The 2013 Contract's Arbitration Provisions Do Not Entitle AGA or Werner to Recover Their Attorney Fees from CCHP*

AGA and Werner alternatively seek fees under the 2013 contract's arbitration provision. This provision states in pertinent part: "8.3 Dispute Resolution. [¶] . . . [¶] b. Arbitration. In the event a dispute [between the parties] is not resolved through the Informal Dispute Resolution process, either party may submit the dispute to binding arbitration through JAMS in accordance with the Federal Arbitration Act. The cost of arbitration, including reasonable attorney's fees, shall be borne by the losing party." (Bold and underscoring omitted.)

According to AGA, if CCHP had arbitrated its contract claims under the above clause and prevailed, CCHP would have been entitled to recover from AGA the attorney fees incurred in the arbitration. Thus, argues AGA, section 1717 reciprocity mandates that AGA, as the putative prevailing party in the instant litigation, recover its attorney fees from CCHP. (See *California-American Water Co. v. Marina Coast Water Dist.* (2017) 18 Cal.App.5th 571, 578 [section 1717 applies in favor of the prevailing party whenever that party would have been liable under the contract for attorney fees had the other party prevailed].)

Section 8.3 is facially inapplicable to this case, however, as it addresses fees incurred in *arbitration*. AGA contends it could not have compelled CCHP to arbitration even if it had wanted to because AGA disputed the validity of the 2013 contract, which included the arbitration provision. But that misses the point. If the

parties *litigate* their dispute, as they did here, Sections 7.2 and 7.3 control; these provisions specifically address when and whether the parties are entitled to recover "attorney fees and other costs of *litigation*" (italics added) from one another.

AGA's position might be more persuasive if the 2013 contract required the parties to arbitrate *all* disputes between them; if that were the case, the prevailing party in every single dispute would be entitled to recover its attorney fees, arguably weighing in favor of an award here. But arbitration was optional under Section 8.3 ("either party *may* submit the dispute to binding arbitration"), and as Sections 7.2 and 7.3 reflect, the parties apparently contemplated there would be some instances where the prevailing party would *not* recover its fees. As already noted, under Sections 7.2 and 7.3, any party who successfully establishes in litigation that the other side breached the contract may recover its attorney fees, but a party who successfully *defeats* a breach of contract claim in litigation may not.

Further, allowing AGA and Werner to apply a fee-shifting provision in an arbitration provision to the costs of litigation would seemingly yield an inequitable result. AGA and Werner incurred nearly $1.4 million in attorney fees in trying their case to the jury. Presumably had the case been resolved at arbitration, their fees would have been lower. (See *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 128 (conc. opn. of Brown, J.) ["'[a]rbitration is often far more affordable to plaintiffs and defendants alike than is pursuing a claim in court'"].)

In applying section 1717, we consider whether the contract language puts the parties to the contract on notice the clause could result in a fee award. (See *Rideau, supra,* 235 Cal.App.4th at p. 1297.) Indeed, "'[o]ne purpose of section 1717 is to *avoid* uncertainty and clarify the issue of [attorney] fees, so both sides can make rational evaluations about the case, including prospects of settlement and so forth.'" (*Paul, supra,* 128 Cal.App.4th at p. 152.) Given this particular fee-shifting provision appears in

the section on arbitration, it seems unlikely CCHP could have anticipated it would apply in the instant litigation.

For each of these reasons, we conclude the arbitration provision does not support a fee award to AGA and Werner under the circumstances.[7]

III.

DISPOSITION

The postjudgment order is affirmed. CCHP shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

ARONSON, P. J.

WE CONCUR:

FYBEL, J.

GOETHALS, J.

[7] Having concluded AGA and Werner are not entitled to recover their attorney fees, we need not address the parties' remaining contentions, including whether AGA was in fact the "prevailing party" on CCHP's cross-complaint.